

The opinion in support of the decision being entered today  
is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

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*Ex parte* CRAIG STEPHEN SLAVTCHEFF,  
JESSICA WEISS GOLDBERG, ANAT SHILOACH,  
MICHAEL MASSARO, and CHRISTINE ELIZABETH KENNEDY

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Appeal 2007-0321  
Application 10/669,547  
Technology Center 1600

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Decided: September 6, 2007

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Before TONI R. SCHEINER, ERIC GRIMES, and RICHARD M. LEBOVITZ, *Administrative Patent Judges*.

GRIMES, *Administrative Patent Judge*.

**DECISION ON APPEAL**

This is an appeal under 35 U.S.C. § 134 involving claims to a method of removing hair. The Examiner has rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

**BACKGROUND**

“Depilatories are cosmetic compositions[s] which remove hair through chemical reaction . . . . Commercially the most common agents are

thioglycolates typically formulated at high pH. Effectiveness requires prolonged residence time on the skin, generally for greater than four minutes" (Specification 1). Because of the conditions used in chemical hair removal, "[s]ignificant irritation and inflammatory response can arise from the procedure, particularly experienced by those with sensitive skin" (*id.*).

The Specification discloses that "the irritation associated with chemical depilation of hair can be reduced or eliminated without loss of efficiency. Pretreatment of the depilation area with lipophilic materials significantly protects skin from redness/erythema" (*id.* at 4). The Specification discloses that "[d]espite an underlying layer of the lipophilic material, chemical reaction by the keratin degrading actives remains unimpeded. The desired hair removal is achieved without extending residence time of the actives" (*id.*).

The Specification discloses that useful lipophilic materials "include oils such as hydrocarbons, natural or synthetic esters and silicones. Among the hydrocarbons suitable examples are mineral oil, isoparaffins, petroleum jelly (petrolatum), polymerized olefins (e.g. polybutenes, polydecenes, isohexadecane) and combinations thereof" (*id.*).

## DISCUSSION

### 1. CLAIMS

Claims 1-17 are pending and on appeal. Claims 1 and 7 are representative and read as follows:

Claim 1. A method for removing hair comprising:

- (i) applying to an area of skin from which hair is to be removed a skin pretreatment composition that comprises from 90 to 100% of lipophilic materials by weight of the pretreatment composition; and

- (ii) applying onto the pretreated area of skin a depilatory composition comprising a keratin degrading agent in an effective amount to chemically react with hair to allow removal.

Claim 7. A kit for removal of hair from an area of skin comprising:

- (a) a skin pretreatment product comprising:
  - (i) a skin pretreatment composition that comprises from 90 to 100% of lipophilic materials by weight of the pretreatment composition; and
  - (ii) a carrier for delivering the skin pretreatment composition onto the area of skin;
- (b) a depilatory product comprising:
  - (i) a depilatory composition comprising a keratin degrading agent in an effective amount to chemically react with hair to allow wipe away removal; and
  - (ii) a carrier for delivering the depilatory composition onto the area of skin subsequent to delivery of the pretreatment composition;
- (c) instructions to apply the skin pretreatment product to an area of skin requiring removal of hair followed by an application of the depilatory product over the area of skin covered by the pretreatment product.

Thus, claim 1 is directed to a method of removing hair. A composition containing 90 to 100% lipophilic material is first applied to the skin. A depilatory composition containing a keratin degrading agent is then applied to the pretreated area to remove the hair.

Claim 7 is essentially directed to a kit for removing hair by the process of claim 1. The kit has two compositions (a pretreatment composition that contains 90 to 100% lipophilic material and a depilatory composition) and carriers for delivering the depilatory composition. The kit also has instructions that direct the practitioner to apply the skin pretreatment product to the skin, and then apply the depilatory product over the area of the skin covered by the pretreatment product.

## 2. PRIOR ART

The Examiner relies on the following references:

LaHann	US 4,546,112	Oct. 8, 1985
Michaels	US 3,843,780	Oct. 22, 1974
Orlow	US 6,749,840 B2	Jun. 15, 2004
Syed	US 5,756,077	May 26, 1998

## 3. OBVIOUSNESS -- CLAIMS 1-6, 10, 11, AND 16

Claims 1-6, 10, 11, and 16 stand rejected under 35 U.S.C. § 103 as obvious in view of LaHann and Michaels (Answer 3-6).

The Examiner cites LaHann as teaching “a method of preventing and/or reducing skin irritation caused by thioglycolate depilatory agent[s] by applying capsaicin and/or its salts to the . . . area which is, or is about to be, depilated . . .” (Answer 3). “The reference teaches to formulate the anti-irritant composition in the form of lotions, creams, or solution, and also teaches using lipophilic emollients including hydrocarbon oils, silicone oils, and various natural and synthetic esters” (*id.*). The Examiner concedes that “[w]hile the reference generally teaches using an anti-irritant composition in the form of lotions, creams, solution, or gel, the reference does not teach an

oil-based composition comprising 90-100 % of lipophilic materials” as required in claim 1 (*id.* at 4).

To meet this limitation, the Examiner cites Michaels as disclosing “a pretreatment composition for shaving to provide[] comfort [and] soothing effect to the skin, and no irritation . . . . The reference teaches a formulation comprising 75-85 % of mineral oil and up to 2 % of emollient such as lanolin” (*id.*). The Examiner urges that claim 1’s limitation requiring 90 to 100 percent lipophilic material in the pretreatment composition would have been obvious in view of Michaels’ disclosure that a shaving pretreatment composition for soothing the skin contained up to 87% lipophilic material (85% mineral oil plus 2% lanolin) (*id.* at 4-5). The Examiner reasons that “a skilled artisan would have discovered by routine experiments the workable range of mineral oil and lanolin to make a composition comprising above 87% of the oil ingredients” (*id.* at 5).

The Examiner contends that one of ordinary skill would have considered it obvious to modify LaHann’s teachings “by using [] an oil-based composition as motivated by Michaels because (i) LaHann teaches mineral oil as a suitable emollient for the composition; [and] (ii) Michaels specifically teaches that the mineral oil-based composition provides comfort, smoothing effect to the skin with reduced or no irritation” (*id.*) The Examiner urges that one of ordinary skill “would have had a reasonable expectation of successfully producing a stable anti-irritant oily composition containing mineral oil, which provides comfort and soothing effect to the skin” (*id.*).

As stated in *In re Oetiker*, 977 F.2d 1443, 1445-1446, 24 USPQ2d 1443, 1444-1445 (Fed. Cir. 1992):

[T]he examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability. If that burden is met, the burden of coming forward with evidence or argument shifts to the applicant.

....

[T]he conclusion of obviousness *vel non* is based on the preponderance of evidence and argument in the record.

We agree with the Examiner that one of ordinary skill would have considered the method recited in claim 1 *prima facie* obvious in view of LaHann and Michaels.

Specifically, LaHann discloses that “[c]apsaicin and/or its salt(s) can be applied before and/or after treatment of the depilated area with the thioglycolate depilatory agent to prevent or reduce irritation caused thereby” (LaHann, col. 2, ll. 47-52). LaHann discloses that the anti-irritant pretreatment compositions can be in the form of creams that contain “from about 5% to about 50% . . . of an emollient . . .” (*id.* at col. 5, ll. 48-51). LaHann discloses that suitable emollients include mineral oil (*id.* at col. 3, ll. 40-41).

Michaels discloses that a composition comprising mineral oil and an emollient has “a soothing effect on skin” when it is used to remove paint from the skin, or as a shaving pretreatment (Michaels, col. 1, ll. 6-45). Michaels discloses that “[t]o assist in the deposition of the mineral oil as a film on the skin, there is added to said oil a minor amount of an anhydrous, low-molecular weight, monohydric aliphatic alcohol of from one to four carbon atoms . . .” (*id.* at col. 2, ll. 37-41). Michaels states that “[i]t is a

good practice to employ . . . from about 15 to 25% of the anhydrous alcohol in conjunction with from about 75 to about 85% of the mineral oil" (*id.* at col. 2, ll. 42-45). Michaels states that other additives, "[f]or instance, emollients, such as lanolin . . . , can all be added in small amounts not to exceed 3% by weight of each component added as specified hereinabove" (*id.* at col. 2, ll. 54-63).

We agree with the Examiner that one of ordinary skill, advised by LaHann that the irritation caused by chemical depilatories can be ameliorated by pre-treating skin with a composition containing up to 50% lipophilic emollients, and being further advised by Michaels that a composition having as much as 87% lipophilic material has a soothing effect on the skin when used as a shaving pretreatment or paint remover, would have considered it obvious to pre-treat an area to be chemically depilated with a composition having high amounts of lipophilic materials, such as Michaels' skin-soothing composition. We also agree with the Examiner that it would have been obvious to include 90% lipophilic materials in Michaels' compositions, in view of Michaels' teachings that the skin-soothing composition may contain "*about* 85% of the mineral oil" (Michaels, col. 2, ll. 44-45, emphasis added) and as much as 2-3% (*id.* at col. 1, l. 19; col. 2, ll. 61-62) of an emollient such as lanolin. It is well settled that determining the optimal value of a result-affecting variable is normally obvious, unless the claimed process condition produces an unexpected result. *See Pfizer Inc. v. Apotex Inc.*, 480 F.3d 1348, 1368-69 (Fed. Cir. 2007).

Appellants argue that LaHann differs fundamentally from the claimed process because the relatively low concentration of the active ingredient,

capsaicin, in LaHann's compositions demonstrates that it is a chemically active agent, whereas the lipophilic materials in the claimed process "are believed to coat the skin thereby serving as a blanket protection against the subsequent application of caustic depilatory. The depilatory 'sees' the keratin fibers but is shielded by the lipophilic materials from contact with underlying skin" (Br. 8). Appellants argue that because LaHann "attenuates irritation through the chemical means of capsaicin" as opposed to using "a physical blanket of lipophilic materials to separate the harsh depilatory from the skin but not from the keratin fiber . . .[,] LaHann et al. does not appreciate the physical approach nor suggest[] using extremely high levels of lipophilic materials" (*id.* at 9).

We are not persuaded by these arguments. It is well settled that "[n]on-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references. . . . [The reference] must be read, not in isolation, but for what it fairly teaches in combination with the prior art as a whole." *In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

In the instant case, LaHann is relied on in combination with Michaels. As discussed above, although LaHann does not teach using a composition containing claim 1's amount of lipophilic material as a chemical depilation pretreatment, Michaels discloses that a composition containing lipophilic material in a percentage very close to that recited in claim 1 has a soothing effect on skin when used as a paint remover or shaving pretreatment. Thus, because claim 1 has been rejected over the *combination* of LaHann and

Michaels, LaHann's failure to *by itself* disclose or suggest all of claim 1's limitations does not render the claim unobvious.

Appellants argue that “[t]here is a significant difference between shaving and depilatory treatment” because shaving uses a sharp blade, whereas hair removal using depilatory compositions uses a chemical reaction to degrade hair (Br. 9). Therefore, Appellants argue, “[m]ethods and compositions which are useful against sharpened blades would not be obvious substitutes for the quite different depilatory treatment” (*id.* at 9-10).

We are not persuaded by this argument. Contrary to Appellants' argument, Michael does not only describe mineral oil to protect against shaving, but also describes its use to keep skin “nonirritated” after using it to remove paint from the skin (Col. 4, ll. 9-11). Moreover, Michaels discloses that removing paint with the mineral oil composition leaves the skin “supple and refreshed” (Michaels, col. 2, ll. 19-24). Thus, we do not agree that one of ordinary skill would have viewed the effect of Michaels' lipophilic composition to be limited to alleviating the mechanical irritation caused by shaving.

Appellants argue that Michaels' disclosure that the anti-irritant composition must contain a minimum of 15% anhydrous alcohol in addition to the mineral oil “teaches away from the at least 90% [lipophilic materials] of the present claims” (Br. 10). Appellants urge that the lower aliphatic alcohols in Michaels' compositions “are hydrophilic rather than lipophilic; the alcohol changes the character of the mineral oil containing composition. Again this leads away from the present invention which seeks to apply a protective lipophilic coat to skin prior to depilation” (*id.*).

“A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant.” *In re Kahn*, 441 F.3d 977, 990, 78 USPQ2d 1329, 1338 (Fed. Cir. 2006). We do not agree that Michaels teaches away from increasing the amount of mineral oil and/or emollient to achieve a composition having 90% lipophilic material.

Specifically, Michaels states that “[t]o assist in the deposition of the mineral oil as a film on the skin, there is added to said oil *a minor amount* of an anhydrous, low-molecular weight, monohydric, aliphatic alcohol of from one to four carbon atoms . . .” (Michaels, col. 2, ll. 37-41, emphasis added). Michaels also states that the composition can contain up to “*about* 85% of the mineral oil” (*id.* at col. 2, ll. 44-45, emphasis added), in addition to as much as 2-3% (*id.* at col. 1, l. 19; col. 2, ll. 61-62), of an emollient such as lanolin. In view of the “minor amount” of alcohol carrier required, and the qualifying “about” language used to describe the mineral oil percentage, we do not agree that Michaels teaches 85% to be the absolute maximum mineral oil percentage. Rather, we agree with the Examiner that one of ordinary skill following Michaels’ teachings would have arrived at claim 1’s composition containing 90% lipophilic material through routine experimentation.

Appellants argue that Michaels’ mineral oil composition is intended as a lubricant for shaving, in contrast with Appellants’ use of the lipophilic composition as a protective coating against harsh chemical depilatories (Br. 11).

We are not persuaded by this argument. Michaels discloses that its composition has “a soothing effect on skin” (*id.* at col. 1, l. 42), and that even when used as a paint remover it leaves the treated area “supple and refreshed” (*id.* at col. 2, l. 24). Thus, one of ordinary skill would have reasoned that the skin-soothing effects of Michaels’ composition were not limited to its lubricant action during shaving.

Appellants argue that *In re Aller*, 220 F.2d 454, 456 (CCPA 1955), cited by the Examiner, is distinguishable from the facts of this case because the rejection in *Aller* was over a single reference that differed from the claim only with respect to the claimed concentration range, whereas in the instant situation “the skilled chemist must not only increase lipophyl [sic] concentration but must transplant this adjusted value into a depilatory system found in a different reference. Especially in a situation where combination of such references is questionable, altering the concentration of one element is not obviously straightforward experimentation” (Br. 11).

We are not persuaded by this argument. Recently addressing the issue of obviousness, the Supreme Court noted that the analysis under 35 U.S.C. § 103 “need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR Int'l v. Teleflex Inc.*, 127 S. Ct. 1727, 1741, 82 USPQ2d 1385, 1396 (2007). The Court also advised that “[a] person of ordinary skill is . . . a person of ordinary creativity, not an automaton.” *Id.* at 1742, 82 USPQ2d at 1397.

As noted above, Michaels discloses that a skin-soothing composition can contain up to “*about* 85% of the mineral oil” (*id.* at col. 2, ll. 44-45, emphasis added), and as much as 2-3% (*id.* at col. 1, l. 19; col. 2, ll. 61-62), of an emollient such as lanolin. In our view, one of ordinary skill, being a person of ordinary creativity, would have inferred from the qualifying “*about*” language that a composition having slightly greater than 85% mineral oil, such as the claimed 90%, would also have skin-soothing properties. Moreover, in view of LaHann’s disclosure that chemical depilatories can cause irritation that can be alleviated by pretreatment with compositions having up to 50% lipophilic emollients, we agree with the Examiner that one of ordinary skill would have considered it obvious to pre-treat a chemical depilation site with a composition having 90% lipophilic material.

We therefore agree with the Examiner that LaHann and Michaels would have rendered claim 1 *prima facie* obvious to one of ordinary skill, and affirm the Examiner’s rejection of claim 1 over those references. Claims 2-6, 10, and 11 fall with claim 1 because they were not argued separately. 37 C.F.R. § 41.37(c)(1)(vii).

Appellants argue claim 16 separately (Br. 11-12). Claim 16 recites “[t]he method according to claim 1 wherein the skin pretreatment composition consists essentially of from 90 to 100% of lipophilic materials by weight of the pretreatment composition, the lipophilic materials protecting skin from redness/erythema.” Appellants argue that the Examiner should not have interpreted the transitional phrase “consisting essentially of” in the same manner as the term “comprising” because the clinical trials in

both Examples 1 and 2 in the Specification were conducted with 100% mineral oil (*id. at 12*).

We are not persuaded by this argument. “By using the term ‘consisting essentially of,’ the drafter signals that the invention necessarily includes the listed ingredients and is open to unlisted ingredients that do not materially affect the basic and novel properties of the invention.” *PPG Indus. Inc. v. Guardian Indus. Corp*, 156 F.3d 1351, 1354 (Fed. Cir. 1998). Moreover, Appellants bear the burden of establishing that the ingredients present in the prior art composition are excluded by the “consisting essentially of” claim language. *In re De Lajarte*, 337 F.2d 870, 874 (CCPA 1964).

In the instant case, Appellants do not point to any evidence that any of the additional ingredients in either LaHann’s or Michaels’ pre-treatment compositions would affect the basic and novel properties of the invention. We note that Appellants’ Examples 1 and 2 list only mineral oil as the pretreatment composition. However, claim 16 is not so limited, reciting from 90 to 100% of lipophilic materials. Moreover, the Specification states that “[c]olorants and fragrances may be included in . . . skin pretreatment compositions of the present invention. Each of these substances may range from about 0.05 to about 5% . . . by weight . . .” (Specification 9, ¶ [00027]). In view of the Specification’s inclusion of ingredients in addition to the lipophilic material, as well as the lack of evidence that the additional ingredients in LaHann and Michaels would affect the basic and novel properties of the claimed invention, we agree with the Examiner that the

phrase “consisting essentially of” encompasses the compositions suggested by the references.

Appellants argue that the Examiner’s reliance on *Ex parte Obiaya*, 227 USPQ 58 (BPAI 1985), is improper because the Examiner has not established a *prima facie* case of obviousness, as required by *Obiaya* (Br. 12).

For the reasons discussed above, we do not agree that the Examiner has failed to establish the *prima facie* obviousness of claim 16. Instead, we agree with the Examiner that one of ordinary skill would have considered it obvious to pre-treat a chemical depilation site with a composition having 90% lipophilic material. We therefore affirm the Examiner’s rejection of claim 16.

#### 4. OBVIOUSNESS -- CLAIMS 7, 12-15, and 17

Claims 7, 12-15, and 17 stand rejected under 35 U.S.C. § 103 as obvious over LaHann, Michaels, and Orlow (Answer 6-9).

The Examiner again cites the combination of LaHann and Michaels as suggesting treating skin with an anti-irritant composition having 90% lipophilic materials before chemical depilation (*id.* at 6-7). The Examiner concedes that LaHann does not specifically mention placing the pretreatment and depilatory compositions in a kit as recited in claim 7, but cites Orlow as teaching that “it is a well known practice in personal care composition art to package the products with a printed instructions as a label or package insert directing the use of such composition” (*id.* at 8).

We agree with the Examiner that one of ordinary skill would have considered it obvious to package a pretreatment composition comprising

90% lipophilic materials together with a depilatory composition in a kit with carriers, as recited in claim 7. As discussed above, one of ordinary skill would have considered it obvious to pre-treat skin with the claimed lipophilic composition followed by a depilatory composition. Moreover, Orlow discloses that personal care compositions for treating excess melanin production in the skin may be provided in the form of a kit that may comprise one or more treatment compositions, and may also comprise pharmaceutically or cosmetically acceptable carriers (Orlow, col. 18, ll. 43-50).

Appellants argue that LaHann and Michaels would not have suggested the pretreatment composition recited in the claims (Br. 13-14). These arguments are addressed above.

Appellants also argue that “the skilled chemist would conceptually avoid lipophilic materials as pre-treaters” because of “concern that a lipophilic coating over the hair would prevent the depilatory chemical from efficiently reacting therewith” (Br. 14). Appellants urge that they were “quite surprised that lipophilic materials such as mineral oil did not significantly inhibit the depilatory chemical reaction. But there was an improvement in lowering skin irritation. These were unexpected results” (*id.*).

We are not persuaded by this argument. LaHann discloses that capsaicin-containing anti-irritant compositions “can be applied *before* and/or after treatment of the depilated area with the thioglycolate depilatory agent to prevent or reduce irritation caused thereby” (LaHann, col. 2, ll. 47-52, emphasis added). LaHann also discloses that the composition may be

formulated as a cream containing “about 50% . . . of an emollient” (*id.* at col. 5, ll. 46-51). LaHann discloses that suitable emollients include mineral oil (*id.* at col. 3, ll. 40-41).

Thus, one of ordinary skill in the art would have expected from LaHann that pre-treating skin with compositions containing significant amounts of lipophilic materials would not interfere with the action of a thioglycolate depilatory. Moreover, it is well settled that “unexpected results must be established by factual evidence.” *In re Geisler*, 116 F.3d 1465, 1470, 43 USPQ2d 1362, 1365 (Fed. Cir. 1997). Appellants have provided no evidence that the cited results were unexpected. “Attorney’s argument in a brief cannot take the place of evidence.” *In re Pearson*, 494 F.2d 1399, 1405, 181 USPQ 641, 646 (CCPA 1974). Appellants therefore have not shown that one of ordinary skill would have considered it unexpected that a thioglycolate depilatory would work when applied to an area pretreated with lipophilic materials.

Appellants argue that Orlow fails to remedy the deficiencies of LaHann and Michaels because Orlow fails to disclose using high levels of lipophilic materials for pre-treating chemically depilated skin, and because Orlow fails to disclose the instructions required by claim 7 (*id.*).

We are not persuaded by this argument. When a kit claim contains written instructions that merely recite the way in which the other components of the kit must be used, “the printed matter is not functionally related to the substrate, [and] the printed matter will not distinguish the invention from the prior art in terms of patentability.” *In re Ngai*, 367 F.3d 1336, 1339 (Fed. Cir. 2004). Thus, instructions regarding the way the

components of a kit are intended to be used do not confer patentability to a kit that is otherwise taught or suggested in the prior art. Moreover, for the reasons discussed above, we agree with the Examiner that LaHann, Michaels, and Orlow suggest packaging a pretreatment composition comprising 90% lipophilic material and a depilatory composition into a kit.

We therefore affirm the Examiner's rejection of claim 7. Claims 12-15 and 17 fall with claim 7 because they were not argued separately. 37 C.F.R. § 41.37(c)(1)(vii).

## 5. OBVIOUSNESS -- CLAIMS 8 AND 9

Claims 8 and 9 stand rejected under 35 U.S.C. § 103 as obvious over LaHann, Michaels, Orlow, and Syed (Answer 9).

Claim 8 recites "the kit of claim 7 wherein the carrier for delivering the skin pretreatment composition is a textile." The Examiner reasons that one of ordinary skill in the art would have considered it obvious "to have provided the kit of the combined references with applicators such as cotton or gloves as motivated by Syed because the reference teaches that it is well known in [the] personal care art to insert applicators for the consumers to handle chemical treatment compositions" (*id.*).

Appellants argue that Syed "does not remedy the basic deficiencies of the combination of the other references" because "[t]here is no disclosure of utilizing a pre-treatment the composition comprising at least 90% of lipophilic materials" and because "[t]he reference is directed at hair coloring rather than to depilation. The combination of art would not render the claims *prima facie* obvious" (Br. 14-15).

We are not persuaded by this argument. For the reasons discussed above, we agree with the Examiner that LaHann, Michaels, and Orlow render the kit of claim 7 obvious. Syed discloses using gloves, cotton, and applicators as components in kits used for protecting hair (Syed, col. 3, ll. 12-31), rather than removing it.

However, as noted above, the analysis under 35 U.S.C. § 103 “need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR Int'l v. Teleflex Inc.*, 127 S. Ct. at 1741. Thus, we agree with the Examiner that one of ordinary skill, being one of ordinary creativity, would have inferred at least from Syed that a textile would be useful as an applicator for personal care products such as the skin pretreatment compositions disclosed by LaHann and Michaels. We therefore also agree that one of ordinary skill would have considered it obvious to include the textile carrier recited in claim 8 in the kit recited in claim 7.

Thus, we affirm the Examiner’s obviousness rejection of claim 8. Claim 9 falls with claim 8 because it was not argued separately. 37 C.F.R. § 41.37(c)(1)(vii).

#### SUMMARY

We affirm the Examiner’s obviousness rejections of claims 1-17.

Appeal 2007-0321  
Application 10/669,547

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2006).

AFFIRMED

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